Jurisdictional Statement

Office - Supreme Court, U.S.
FILED
FEB 27 1982
ALEXANDER L. STEVAS,
CLERK

81-1609

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.....

ROBERT M. HELTON ET AL. Appellants,

vs.

CITY OF BURKBURNETT, Appellee.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

ROBERT M. HELTON
713 Lamar Street
Wichita Falls, Texas 76301

Buchanan's Office Supply, 816 Scott Street, Wichita Falls, Texas 76301, (817) 322-2146

INDEX

Jurisdictional Statement 2
Opinion Below 2
Grounds of Jurisdiction of Supreme Court 2
Question Presented 4
Statement of the Case 5
Substantiality of Federal Question 8
Conclusion 15

TABLE OF CASES

Charleston Federal Sav. & Loan Asso. v. Alderson (1945), 324 U.S. 182, 65 S.Ct. 624, 89 L.Ed. 857 3
Chastleton Corporation v. Sinclair, (1924), 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841 12
City of San Angelo v. Boehm Bakers, (1945), 144 Tex. 281, 190 S.W.2d 67 9
Clouser v. City of Norman, (Okl. 1964), 393 Pac.2d 827 . . . . . 8, 10
Cramp v. Board of Public Instruction, (1961), 368 U.S. 278, 82 S.Ct. 275, 7, L.Ed.2d 285 9
Dahnke-Walker Milling Co. v. Bondurant, (1921), 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239 13
Dobbins v. Los Angeles, (1904), 195 U.S. 223, 25 S.Ct. 18, 49 L.Ed. 169 12
Elliff v. Texon Drilling Co., (1948), 146 Tex. 575, 210 S.W.2d 558 8
Euclid v. Ambler Realty Company, (1926), 277 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 ALR 1016 . . . . . 9, 11
Grayned v. City of Rockford, (1972), 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 10
Interstate Circuit v. Dallas, (1968), 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225 7

Kelso, Ex parte, (1905), 147 Cal. 609, 82 Pac. 241, 2 LRA(NS) 796 8
Kraus, M., & Bros. v. United States, (1946), 327 U.S. 614, 66 S.Ct. 705, 90 L.Ed. 894 10
Lawton v. Steele, (1893), 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 12
Minnesota v. Barber, (1889), 136 U.S. 313, 10 S.Ct. 862, 34 L.Ed. 455 13
Nectow v. City of Cambridge, (1927), 277 U.S. 365, 48 S.Ct. 447, 72 L.Ed. 842 11
Penn. Coal Co. v. Mahon, (1922), 260 U.S. 393, 43 S.Ct. 160, 67 L.Ed. 322 . . . . . 8, 11
Spann v. City of Dallas, 1921, 111 Tex. 350, 235 S.W. 513 8
State of Washington ex rel Seattle v. Roberage, (1928), 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 10
Village of Terrace Park v. Errett, (1926), 12 F.2d 240, 6th Cir. 8
Whitney v. California, (1926), 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 13
Yick Wo v. Hopkins, (1885), 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 10

OTHER AUTHORITIES

Arts. 1011a-j, Texas Civil Statutes 9
28 U.S.C. 1257 2
Ordinance No. 375 . . . . . 3, 4
Due Process and Equal Protection Clauses, 14th Amendment, U.S. Constitution 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _ _ _ _ _ _ _ _ _

ROBERT M. HELTON ET AL. Appellants,

VS.

CITY OF BURKBURNETT, Appellee.

APPEAL FROM
THE COURT OF CIVIL APPEALS
FOR THE SECOND SUPREME JUDICIAL
DISCTRICT OF TEXAS

JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

Pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, appellants, Robert M. Helton and Helton Oil Company, a partnership, file this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment of affirmance entered by the Court of Civil Appeal, Fort Worth, and order of the Supreme Court of Texas refusing to grant a Writ of Error, and should exercise such jurisdiction herein.

OPINION BELOW

The opinion of the Court of Civil Appeal, Fort Worth, appears in 619 S.W.2d 23 and is included herein as Appendex A (p. A1).

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from a state civil case wherein the appellants were permanently enjoined from drilling an oil or gas well on their Beach Lease located within the city limits of the City of Burkburnett, Texas, unless there be first obtained a drilling permit from the city as required by Ordinance No. 375 of said city.

June 25, 1981, is the date and entry of the judgment sought to be reviewed; July 23, 1981, is the date and entry of the order denying a rehearing; December 2, 1981, is the date the Supreme Court of Texas denied an application for a Writ of Error to the Court of Civil Appeal at Fort Worth; and the notice of appeal was filed on February 22, 1982, in the Court of Appeals at Fort Worth, the successor court to the Court of Civil Appeals.

Title 28 U.S.C. § 1257(2) is believed to confer jurisdiction on this Court.

The case of *Charleston Federal Sav. & Loan Asso. v. Alderson* (1945) 324 U.S. 182, 65 S.Ct. 624, 89 L.Ed. 857, reh den 324 U.S. 888, 65 S.Ct. 863, 89 L.Ed. 1436 (see the last paragraph, 324 U.S. at 185, 65 S.Ct. at 627, and authorities there collected and cited), is relied upon to sustain this Court's jurisdiction.

Since the validity of a city ordinance is involved, its text, verbatim, in pertinent part, follows:

> "Section 2: Permit to Drill Required
>
> Before any well may be drilled within the corporate limits of the City, an application for a permit must be filed with the Director. A permit must be obtained from the Commission before drilling operations begin, and said permit is nontransferrable."
>
> "Section 8: Refusal of Permit
>
> No permit shall be issued by the Commissioners to drill any well when:
>
> (1) . . .
>
> (2) The location for same shall be within a 50 foot radius of any residence, commercial or public structure, unless application contains a signed, notarized release from the property owners within such 50 foot radius."
>
> "Section 10: Hearing before Commissioners
>
> (1) After the receipt of the recommendation made by the Director the Commissioners shall then schedule a hearing thereon at the next regular meeting of the Commissioners at which time either party may be heard by the Commissioners prior to their final decision.

> (2) The decision of the Commissioners shall be final and in making its decision it shall, in addition to other considerations, have the power and authority to refuse any permit to drill any well at any particular location within the City, where by reason of such particular location and the character and value of the permanent improvements already erected on or adjacent to the particular location in question, for school, hospital park civic purposes, health reasons, safety reasons, or any of them where the drilling of such wells on such particular location might be injurious or be a disadvantage to the city or its inhabitants as a whole or to a substantial number of its inhabitants or would not promote orderly growth and development to the city."

The official citation is: Ordinance No. 375, of the ordinances of the City of Burkburnett, Texas. They are not printed in any published lawbook.

A copy of the opinion below is appended as Appendix A (p. A1). A copy of the judgment is appended as Appendix B (p. A5). A copy of the order overruling the motion for rehearing is appended as Appendix C (p. A6). A copy of the order of the Supreme Court of Texas denying the application for a Writ of Error is appended as Appendix D (p. A7). A copy of the notice of appeal is appended as Appendix E (p. A9). A copy of Ordinance No. 375, verbatim, is appended as Appendix F (p. A12).

QUESTION PRESENTED

On their face or as applied, are §§ 8(2) and 10(2) and § 2 when related to sections 8(2) and 10(2) of Ordinance No. 375 repugnate to the "due process" and "equal protection" clauses of the 14th Amendment, United States Constitution?

STATEMENT OF THE CASE

The opinion below fairly and correctly states the case. It will be quoted:

> "Robert M. Helton challenges the constitutionality of Ordinance No. 375 of the City of Burkburnett. This case stems from his refusal to comply with that Ordinance. Ordinance No. 375 regulates the drilling and operation of oil wells within the city limits.
>
> Helton refused to obtain a permit to drill an oil well prior to the commencement of drilling operations at a location designated as the "Beach Lease". The Beach Lease is located within the city limits in the southern, relatively undeveloped,[1] section of the City of Burkburnett. The city responded to this refusal by obtaining a permanent injunction enjoining Helton from further drilling until he obtained a permit from the city as required by Ordinance No. 375.
>
> Helton seeks to reverse this holding, asserting that Ordinance No. 375 violates the 14th Amendment of the U.S. Constitution on its face and as applied to the Beach Lease.
>
> Helton raises two points of error, arguing that Ordinance No. 375 violates the 14th Amendment of the U.S. Constitution in that it denies him due process of law and equal protection of the law.
>
> We overrule each point of error and affirm the judgment."

---

[1] The record shows that the Beach Lease is located in the southerly part of the south 2,000 acres within the city limits. Two Burkburnett families reside within this 2,000 acres of land. The Beach Lease contains 80 acres.

The above extract from the opinion together with extracts hereinafter quoted, sustains this Court's jurisdiction under the rule of *Alderson,* supra:

> "Helton's primary complaint is that Ordinance No. 375 purports to provide the power to *totally* prohibit drilling and as such goes beyond the legitimate use of the city's police power, that it does more than merely regulate when it purports to possess the power to totally prohibit the use of the land and the underlying minerals." (Emphasis added.)
>
> "The city argues that Ordinance No. 375 exists as a valid exercise of its police power. We agree."
>
> . . .
>
> "Helton argues that Ordinance No. 375 is invalid in that it presumes to grant the city the authority to take away or impair his vested right to reach the oil underlying his property."
>
> . . .
>
> "We find that Ordinance No. 375 is neither unreasonable, arbitrary, nor discriminatory upon its face or as applied. Its enforcement does not deprive Helton of his property rights without due process of law."
>
> "Nor does the challenged Ordinance deny Helton equal protection of the law by creating a class of land owners – oil lease owners – regulated apart from other land owners."
>
> . . .
>
> "We overrule each of Helton's points of error and affirm the judgment of the trial court."

The record of the case will reflect that no Texas state law question was raised in the trial court or the appeal courts of Texas. The issues generated for determination in the courts of Texas were limited to questions of "due process" and "equal protection" arising from those clauses of the 14th Amendment, U.S. Constitution.

This Court can and should judicially notice that the Court below – the Court of Civil Appeal Second Supreme Judicial District sitting at Fort Worth, Texas – is the highest appeal court in Texas to which the case could be appealed in that State in light of the discretionary refusal of the Supreme Court of Texas to grant an Application for a Writ of Error. See *Interstate Circuit v. Dallas,* 1968, 390 U.S. 676, 88 S.Ct. 1298, 20 L.Ed.2d 225. See Appendix D, (p. A-7). The civil appeal system in Texas has not been changed since the date of that case.

SUBSTANTIALITY OF FEDERAL QUESTION

This appeal presents, on the one hand, the right of the city of Burkburnett, Texas, to utilize her police power and the right, on the other hand, of the appellants, as Texas minerals owners within the city limits to use their subsurface minerals – oil and gas, a scarce natural resource – that can *only* be reached by drilling. Section 8(1) operates to totally prohibit drilling, but only in the streets and alleys of the city. Since the minerals necessarily cover land other than streets and alleys, the total prohibition of § 8(1) is a mere incident to regulation and is valid. Section 2 operates through sections 8(2) and/or 10(2). Sections 8(2) and/or 10(2) grant an authority to the city Commissioners to deny a drilling permit and *thereby can operate* to totally prohibit drilling through § 2. Ordinance No. 375 is *not* a spacing law that fixes "drilling districts" or that allocates a fixed number of acres of minerals upon which only one well can be drilled and provides for the shared participation therein of all minerals owners with minerals within the drilling district or spaced area and then, as an incident to such valid regulation, prohibits the drilling of more than one well therein. Since the ordinance grants the power to *totally prohibit drilling*, the law can effectively operate to totally prohibit the use of the subsurface minerals – oil or gas or both.

Oil and gas in place in the subsurface in Texas are real property. *Elliff v. Texon Drilling Co.*, 1948, 1946 Tex. 575, 210 S.W.2d 558 at 561 and cases cited. The total prohibition of the use of real property in the sense *that it cannot be utilized in any manner* is and has been historically and traditionally a prohibition that is at war with the due process and equal protection clauses of the U. S. Constitution[2] *UNLESS* measures

---

[2] *Ex parte Kelso*, 1905, 147 Cal. 609, 82 Pac. 241, 2 LRA(NS) 796; *Penn. Coal co. v. Mahon*, 1922, 260 U.S. 393, 43 S.Ct. 160, 67 L.Ed. 322; *Spann v. City of Dallas*, 1921, 111 Tex. 350, 235 S.W. 513; *Village of Terrace Park v. Errett*, 1926, 12 F.2d 240, 6th Cir.; *Clouser v. City of Norman*, Okl. 1964, 383 Pac.2d 827. Respectively, these cases involved stone, coal, land use, gravel and oil.

consistent with the due process and equal protection guidelines set forth by this Court in the celebrated case of *Euclid v. Ambler Reality Company*, 1926, 277 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 ALR 1016, are taken by the government in question who enacts such laws.

Following the date of this Court's decision and opinion in *Euclid*, the U.S. Department of Commerce produced a proposed set of due process and equal protection guidelines that were by the Department deemed consistent with the guidelines set forth by this Court in *Euclid*. In 1927, Texas adopted them by the enactment of Arts. 1011a-j, Texas Civil Statutes. This history is found stated in the opinion of the Texas case of *City of San Angelo v. Boehm Bakery*, 1945, 144 Tex. 281, 190 S.W.2d 67 at 69.

It is established in the record in this case at page 37 of the trial transcript, and such establishment is unquestioned and undisputed, that the City of Burkburnett has never enacted the due process and equal protection measures requires by *Euclid's* case and required by Arts. 1011a-j, Texas Civil Statutes.

Thus, in enacting Ordinance No. 375 and in failing to comply with the due process and equal protection guidelines of the *Euclid* case and Arts. 1011a-j, Texas Civil Statutes, Burkburnett has "gone too far" when it drew from its police power an authority to make law that could effectively operate to totally prohibit the use of oil and gas within the subsurface of land located inside of its city limits.

In essence, the highest court in Texas to which this case could be taken has determined a U.S. Constitutional question that cannot stand when arrayed against the rule of *Euclid's* case and the rule of *Mahon's* case of this Court.

In addition, the administrative guideline found in § 10(2) is so vague and uncertain as to fail to be any guideline at all, *Cramp v. Board of Public Instruction*, 1961, 368 U.S. 278,

287, 82 S.Ct. 275, 7 L.Ed.2d 285, 292, in that it amounts to no more than a "policy statement", condemned by this Court in *Grayned v. City of Rockford*, 1972, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222; *M. Kraus & Bros. v. United States*, 1946, 327 U.S. 614, 626, 66 S.Ct. 705, 709, 90 L.Ed. 894, and thereby allows the administrative discretion to be the mere will of the city Commissioners, condemned by this Court in *Yick Wo v. Hopkins*, 1885, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, as well as in *Grayned's* case, supra, and *Kraus'* case, supra. As a result, neither the mineral owners nor the city Commissioners are able to know what drilling locations are to be allowed or denied from a study and consideration of § 10 (2).

Lastly, § 8(2) is a constitutionally impermissable delegation of governmental power to private persons and the section shows on its face that it is not for a public purpose, that is, for the protection of the public in general, but, on the otherhand, it is for a private purpose, that is, for the benefit of the adjoining property owners, and consequently, is fatal when exposed to the rule of *State of Washington ex rel Seattle v. Roberge*, 1928, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210.

The above, as a Part I, covers the substantiality of appellants' facial attack.

In the court of first instance and again in the appeal Courts, appellants strongly urged that the ordinance was unconstitutionally applied to their Beach Lease. Great reliance was placed upon the case of *Clouser v. City of Norman*, Okla. 1964, 393 Pac.2d 827. In *Clauser's* case, the leased land covered ten acres. In the bench case the leased land covered 80 acres. In both cases the land was within a city limits. In both cases, the city ordinance authorized the city to deny a permit. In both cases, drilling started without obtaining a permit. In both cases, though the land was within the city limits, it was

farm or ranch type land and the drilling site was not surrounded by people or urban development or improvements. In both cases, drilling was halted by an injunction. The Oklahoma Supreme Court ordered the injunction dissolved, stating, "There was no dense population in the area. The only persons in the entire ten-acre tract were the Clouser family. The only improvements belonged to the Clousers. The center of this ten-acre tract is more than 300 feet from the edge of the tract. The development of this tract could not affect other areas nor could it affect the future development of the city." *Id.* 380.

With all due respect to the Court below, when it swept with the broom of presumed constitutional application of the Ordinance to the 80 acre cattled inhabited Beach Lease located in the south part of the south 2,000 acres of the city limits in which 2,000 acres only two inhabitant families resided – the nearest being 1,400 feet to the northeast – the broom conflicted with the words of this Court in *Euclid's* case, [272 U.S. at 395, 47 S.Ct. at 114], restated and reaffirmed in *Nectow v. City of Cambridge,* 277 U.S. 365, 188, 48 S.Ct. 447, 448, as follows:

> ". . . The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.",

and,

> "The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power." *Penn. Coal Co. v. Mahon,*

1922, 260 U.S. 393, 413, 43 S.Ct. 160, 67 L.Ed. 322, 325,

and,

"The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." *Lawton v. Steele,* 1893, 152 U.S. 133, 137, 14 S.Ct. 499, 38 L.Ed. 385,

and,

"But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or *to use and enjoy property. Dobbins v. Los Angeles,* 1904, 195 U.S. 223, 236, 25 S.Ct. 18, 49 L.Ed. 169", (Emphasis added.),

and,

"But even as to (legislative error) a Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared." Per MR. JUSTICE HOLMES in *Chastleton Corporation v. Sinclair,* 1924, 264 U.S. 543, 547, 44 S.Ct. 405, 406, 68 L.Ed. 841,

and,

> "A statute may be invalid as applied to one state of facts and yet valid as applied to another." *Dahnke-Walker Milling Co. v. Bondurant*, 1921, 257 U.S. 282, 289, 42 S.Ct. 106, 108, 66 L.Ed. 239",

and,

> "As a statute, even if not void on its face, may be challenged because invalid as applied . . . the result of such an inquiry may depend upon the specific facts of the particular case." *Whitney v. California*, 1926, 274 U.S. 357, 378, 47 S.Ct. 641, 648, 71 L.Ed. 1095,

and lastly,

> "The *presumption* that this statute was enacted, in good faith, for the purpose of expressed in the title, namely, to protect the health of the people of Minnesota, *cannot control* the final determination of *the question* whether it is repugnant to the Constitution of the United States. There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and *yet a statute enacted by it*, under the forms of law, may, *by its necessary operation*, be destructive of rights granted or secure by the Constitution. In such cases, the courts must sustain the supreme law of the land, by declaring the statute unconstitutional and void. This principal of constitutional interpretation has been often announced by this court [Citations omitted]. Upon the authority of those cases, and others that could be cited, *it is our duty to inquire, in respect to the statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the constitution of the United States. Minnesota v. Barber*, 1889, 136 U.S. 313,

319-320, 10 S.Ct. 862, 863-864, 34 L.Ed. 455, (Emphasis added.).

Neither the trial court nor the Court of Civil Appeals made any finding of facts, other than that the Court of Civil Appeals found that "The Beach Lease is located within the city limits in the southern, relatively undeveloped, section of the City of Burkburnett". In order to be able to determine appellants' unconstitutional application claims, this Court should hear this case upon a printed record of the trial evidence in order to be able to make a fair decision of this constitutional claim.

The above, as a Part II, covers the substantiality of appellants' applied attack.

The rights at stake are of that character and nature and importance which would warrant a final determination by this high Court. It is not enough that Burkburnett has the power to REGULATE drilling. The power is not invoked and the means are unwarranted when the City, under the guise of the use of the police power, goes "too far" by drawing forth a power to *totally prohibit drilling* and thereby transcind U.S. Constitutional limits upon the means used to utilize the power by failing to follow the due process guidelines of the *Euclid* case and by failing to specify guidelines in its law by which both the mineral owners, including these appellants, and the city Commissioners are able to know what well locations within the city limits can or cannot be permitted for drilling.

The case is not mooted by any facts; not colored or feigned. It is an actual case and controversy. The question presented is of that nature and character and importance that would warrant plenary consideration, with brief on the merits and oral argument, for their resolution.

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before the Court a substantial and important federal constitutional question which requires plenary consideration, with brief on the merits and oral argument, for their resolution.

Respectfully submitted,

Robert M. Helton
Robert M. Helton,
Attorney for appellants.

Appendix

APPENDIX A

ROBERT M. HELTON, Individually, and HELTON OIL COMPANY, a Partnership, Appellant,

vs.

CITY OF BURKBURNETT, Appellee.

No. 18433.

COURT OF CIVIL APPEALS OF TEXAS, FORT WORTH.

June 25, 1981.

Rehearing Denied July 23, 1981.

619 S.W.2d 23

R. M. Helton, Wichita Falls, for appellant.

Walter Nelson, Burkburnett, Clyde Fillmore, Wichita Falls, for appellee.

OPINION

SPURLOCK, Justice.

Robert M. Helton challenges the constitutionality of Ordinance No. 375 of the City of Burkburnett. This case stems from his refusal to comply with that Ordinance. Ordinance No. 375 regulates the drilling and operation of oil wells within the city limits.

Helton refused to obtain a permit to drill an oil well prior to the commencement of drilling operations at a location

designated as the "Beach Lease". The Beach Lease is located within the city limits in the southern, relatively undeveloped, section of the City of Burkburnett. The city responded to this refusal by obtaining a permanent injunction enjoining Helton from further drilling until he obtained a permit from the city as required by Ordinance No. 375.

Helton seeks to reverse this holding, asserting that Ordinance No. 375 violates the 14th Amendment of the U.S. Constitution on its face and as applied to the Beach Lease.

Helton raises two points of error, arguing that Ordinance No. 375 violates the 14th Amendment of the U.S. Constitution in that it denies him due process of law and equal protection of the law.

We overrule each point of error and affirm the judgment.

Helton's primary complaint is that Ordinance No. 375 purports to provide the power to totally prohibit drilling and as such goes beyond the legitimate use of the city's police power, that it does more than merely regulate when it purports to possess the power to totally prohibit the use of the land and underlying minerals.

The city argues that Ordinance No. 375 exists as a valid exercise of its police power. We agree.

The Ordinance regulates in the following ways: It requires a permit to drill within the city limits. It charges a permit fee of $250.00. It requires a surety bond to be filed with the city. It requires the lessee to carry a minimum amount of insurance, covering personal injury and property damage. It prohibits wells from being drilled within fifty feet and tank batteries from being located within one hundred feet of a residence, or a commercial or public structure unless a signed, notarized release is obtained in advance from the such owners.

It authorizes the City Commissioners to refuse any permit to drill a well "where by reason of such particular location and the character and value of the permanent improvements already erected on or adjacent to the particular location in question, for school, hospital park civic purposes, health reasons, safety reasons, or any of them where the drilling of such wells on such particular location might be injurious or be a disadvantage to the city or its inhabitants as a whole or to a substantial number of its inhabitants or would not promote orderly growth and development to the city."

Comprehensive zoning has long been established as a legitimate exercise of a city's police power. *Euclid v. Ambler Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

In determining the constitutionality of an ordinance passed pursuant to the police power of the city it must be borne in mind that the presumptions favor the ordinance. For a challenge to be successful the ordinance must clearly appear to be unreasonable and arbitrary. *Zahn v. Bd. of Public Works*, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074 (1927). In making the determination this court is not entitled to substitute its judgment for that of the city and its officers. *Zahn v. Bd. of Public Works, supra.*

Helton argues that Ordinance No. 375 is invalid in that it presumes to grant the city the authority to take away or impair his vested right to reach the oil underlying his property. However, the deprivation of individual rights cannot prevent the operation of the police power, once it is shown that its exercise is within the meaning of due process of law. *Hadacheck v. Los Angeles*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915). Nor do we conclude that Ordinance No. 375 works a deprivation of vested property rights. It neither prohibits the drilling of oil and gas wells nor their maintenance and operation. The

Ordinance merely provides rules facilitating the orderly and harmonious development of both oil exploration and city growth.

We find that Ordinance No. 375 is neither unreasonable, arbitrary, nor discriminatory upon its face or as applied. Its enforcement does not deprive Helton of his property rights without due process of law.

Nor does the challenged Ordinance deny Helton equal protection of the law by creating a class of land owners – oil lease owners – regulated apart from other land owners. This Ordinance applies to all persons similarly situated within the city limits. As stated in 56 Am.Jur.2d, *Classification* § 365 (1971):

> "The equal protection clause of the Fourteenth Amendment does not prohibit a municipality with properly delegated powers from enacting ordinances based on reasonable classification of the objects of the legislation or of the persons whom it affects. Ordinances will not be regarded as special and class legislative merely because they affect one class and not another, provided they affect all members of the same class alike; if a classification in municipal ordinances is reasonable, including all that may fairly be said to be similarly situated and affecting alike all of those, there is no forbidden discrimination. Thus, specific municipal regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other businesses of a different kind . . ."

We overrule each of Helton's points of error and affirm the judgment of the trial court.

APPENDIX B

ROBERT M. HELTON, Individually, and HELTON OIL COMPANY, a Partnership

vs.

CITY OF BURKBURNETT

No. 18433

From the DISTRICT COURT OF WICHITA COUNTY (No. 114,354-A)

June 25, 1981

OPINION BY JUSTICE SPURLOCK

This cause came on to be heard on the transcript of the record and the same having been reviewed it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the trial court in this cause be and it is hereby affirmed.

It is further ordered that Robert M. Helton, appellant, and his surety, Harold Lerew, pay all costs in this behalf expended, for which let execution issue, and that this decision be certified below for observance.

FILED
Court of Civil Appeals
Second Sup. Judicial Dist.
June 25, 1981
Yvonne Palmer, Clerk

APPENDIX C

This is a copy of this Court's judgment overruling appellant's motion for rehearing as found in Minute Book volume 19, page 459.

ROBERT M. HELTON, Individually and HELTON OIL COMPANY, a Partnership

vs.

CITY OF BURKBURNETT

21072 – 18433

July 23, 1981

This day came on to be heard appellants' motion for rehearing in this cause, and said motion having been duly considered by the Court is this day overruled.

FILED
Court of Civil Appeals
Second Sup. Judicial Dist.
July 23, 1981
Yvonne Palmer, Clerk

APPENDIX D

IN THE SUPREME COURT OF TEXAS

No. C-654

December 2, 1981

R. M. HELTON ET AL.

vs.

CITY OF BURKBURNETT

From Wichita County
Second District

Application of petitioners for writ of error to the Court of Civil Appeals for the Second Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, R. M. Helton et al., and their surety, Harold Lerew, pay all costs incurred on this application.

NO MOTION FOR REHEARING WAS FILED

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a

true and correct copy of the order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 22 day of February, 1982.

GARSON R. JACKSON, Clerk

By Claire Keefe, Deputy.

FILED
Supreme Court
of Texas
December 2, 1981
Garson R. Jackson, Clerk

APPENDIX E

NO. 18433

IN THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDIDIAL DISTRICT OF TEXAS

ROBERT M. HELTON, Individually, and HELTON OIL COMPANY, a Partnership, Appellant

vs.

CITY OF BURKBURNETT, Appellee

NOTICE OF APPEAL

1. Robert M. Helton, individually and Helton Oil Company, a partnership, appellants, are the parties taking the appeal.

2. They appeal from the Order denying the Application for a Writ of Error made and entered by the Supreme Court of Texas.

3. It was entered December 2, 1981.

4. They appeal to the Supreme Court of the United States by authority of 28 U.S.C. § 1257(2).

5. This notice is directed to the Hon. Walter Nelson, City Attorney, counsel of record in this Court, whose office is in Burkburnett, Texas; and to the Hon. Clyde Fillmore, Associated Counsel of the City of Burkburnett, counsel of record in this Court, whose office is in Wichita Falls, Texas.

Respectfully given,

R. M. HELTON,
Counsel for Appellants
714 Lamar St.
Wichita Falls, Texas 76301

CERTIFICATE OF SERVICE

I, R. M. Helton, a Member of the Bar of the Supreme Court of the United States, certify that a single Xerox copy of this Notice of Appeal together with a Xerox copy of the Entry of Appearance in the Supreme Court of the United States of the undersigned as counsel for the appellant-petitioner therein, (the original of which is annexed to the original notice of appeal), was on the 20th day of February, 1982, mailed, first class, properly addressed and with sufficient postage, to the

> Hon. Walter Nelson, City Attorney, City of Burkburnett, Texas, at his office at 217 N. Ave. D, Burkburnett, Texas, 76354, a distance of less than 500 miles; and to the Hon. Clyde Fillmore, Associated Counsel of the City of Burkburnett, Texas, at his office at 816 7th St., Wichita Falls, Texas, 76301, a distance of less than 500 miles.

I further certify that the aforesaid service constitutes service of the Notice of Appeal upon all parties required to be served in this case.

I further certify that on the 20th day of February, 1982, the original of this Notice of Appeal and the original of my Entry of Appearance in the Supreme Court of the United States was mailed, first class, properly addressed and with sufficient postage to the

> Hon. Yvonne Palmer, Court Clerk, The Court of Appeals, (formerly the Court of Civil Appeals), Second Supreme Judicial District of Texas, 200 Civil Courts Building, Fort Worth, Texas, 76102.

Dated this the 20th day of February, 1982.

R. M. HELTON, Counsel for Appellants
713 Lamar St.
Wichita Falls, Texas 76301
Member of the Bar of the
Supreme Court of the United States

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NO. ____

ROBERT M. HELTON, INDIVIDUALLY, AND HELTON OIL COMPANY, A PARTNERSHIP, Petitioners

vs.

CITY OF BURKBURNETT, Respondent

ENTRY OF APPEARANCE OF COUNSEL

The Clerk will enter my appearance as Counsel for the Petitioners.

R. M. HELTON
713 Lamar Street
Wichita Falls, Texas 76301

The Clerk is requested to notify counsel of action of the Court by means of:

(X) Regular Mail

FILED
Court of Civil Appeals
Second Sup. Judicial Dist.
February 22, 1982
Yvonne Palmer, Clerk

APPENDIX F

ORDINANCE NO. 375

AN ORDINANCE AMENDING, REVISING AND SUPERSEDING ORDINANCE NO. 309 CONTROLLING AND REGULATING THE DRILLING EXPLORATION AND OPERATION FOR OIL AND GAS WITHIN THE CITY LIMITS OF BURKBURNETT, TEXAS

BE IT ORDAINED BY THE BOARD OF COMMISSIONERS OF THE CITY OF BURKBURNETT, TEXAS, THAT:

Ordinance No. 309 of the City of Burkburnett, Texas shall read as follows:

Section 1: Definitions

For the purpose of this ordinance, the following words and phrases shall have the meaning respectively ascribed to them by this section:

(1) "Well" shall mean any gas, oil, or injection well and shall include not only new wells, but deepening any presently existing well to another zone, and/or the reopening of any well previously plugged in accordance with Railroad Commission regulations.

(2) "City" shall mean City of Burkburnett, Texas.

(3) "Director" shall mean Director of Public Works or his assistant.

(4) "Commissioners" shall mean the Board of Commissioners of the City of Burkburnett.

Section 2: Permit to Drill Required

Before any well may be drilled within the corporate limits of the City, an application for a permit must be filed with the Director. A permit must be obtained from the Commission before drilling operations begin, and said permit is non-transferrable.

Section 3: Area of Compliances

All wells existing within the corporate limits of the City, as of the day of adoption of this amendment, are covered immediately by this ordinance. All wells brought within the corporate limits by the City by future annexation of territory to the City shall be covered by this ordinance immediately upon said annexation.

Section 4: Application Contents

The application for the permit, required by this ordinance shall set forth the following information:

(1) A copy of the drilling permit which has been issued by the Railroad Commission.

(2) The name and address of the operator of the lease.

(3) A description of the lease or lands involved in the drilling unit.

(4) A plat showing the location of the well, the ownership of the land, and offset operators.

(5) Satisfactory evidence of liability and property damage insurance as required by this chapter.

(6) Maximum drilling depth proposed.

(7) Method of operation of the proposed well (injection or production).

(8) A plat indicating all the surface rights property owners adjacent to the proposed well.

Section 5: Fee

The fee for a permit required by this chapter, shall be in the sum of $250.00 to be submitted with the application. If drilling has not commenced within one year from the date of permit, another permit will be required under terms of this section.

Section 6: Bond

A surety bond shall be filed with the city in the amount of $25,000.00 along with the permit application for the initial well applied for by an operator after publication of this ordinance. If an operator has a $25,000.00 bond on file, additional bond is not needed for subsequent wells. This bond will be in effect as long as this operator operates wells inside the city. This bond shall be in favor of the city and all persons concerned, conditioned that the permittee will comply with the terms, conditions and requirements of this ordinance.

Section 7: Insurance

In addition to the bond required in section six above, the permittee shall carry a policy or policies of standard comprehensive public liability insurance, including contractual liability covering bodily injuries and property damage, naming the permittee and the City, with an insurance company authorized to do business within the State of Texas. Such policy or policies in the aggregate shall provide for the following minimum coverages:

(1) Bodily injuries one hundred thousand dollars ($100,000) one person; three hundred thousand dollars ($300,000) one accident.

(2) Property damage, one hundred thousand dollars ($100,000). Permittee shall file with the Director along with the application a certificate of insurance as above stated. The insurance policy or policies shall not be cancelled without written notice to the Director at least ten days prior to the effective date of such cancellation. In the event such insurance policy or policies are cancelled, the permit granted under such policy shall cease until permittee files additional insurance as provided herein.

Section 8: Refusal of Permit

No permit shall be issued by the Commissioners to drill any well when:

(1) The location for same shall be within the dedicated rights-of-way of any streets for alleys of the City.

(2) The location for same shall be within a 50 foot radius of any residence commercial or public structure, unless application contains a signed, notarized release from the property owners within such 50 foot radius.

Section 9: Permit Hearing

The Director shall notify in writing the surface rights property owners adjacent to the proposed drilling site and location of said well not less than (5) five or more than (15) fifteen days prior to a hearing on the permit application.

Hearing will be held before the Director, at the conclusion of said hearing and after making such investigation as he may deem proper or necessary under the circumstances, the

Director shall make his recommendation to the Commissioners not more than five (5) days after said hearing has been completed, either recommending the issuance of such permit or recommending the denial thereof. Such recommendations shall be in writing and attached thereto the reasons for the same including any instruments or documents submitted to him at such hearing.

Section 10: Hearing before Commissioners

(1) After the receipt of the recommendation made by the Director the Commissioners shall then schedule a hearing thereon at the next regular meeting of the Commissioners at which time either party may be heard by the Commissioners prior to their final decision.

(2) The decision of the Commissioners shall be final and in making its decision it shall, in addition to other considerations, have the power and authority to refuse any permit to drill any well at any particular location within the City, where by reason of such particular location and the character and value of the permanent improvements already erected on or adjacent to the particular location in question, for school, hospital park civic purposes, health reasons, safety reasons, or any of them where the drilling of such wells on such particular location might be injurious or be a disadvantage to the city or its inhabitants as a whole or to a substantial number of its inhabitants or would not promote orderly growth and development to the city.

Section 11: Issuance of Permit

Any permit granted by the Commissioners shall be issued by directive of the Commissioners and signed by the Director on a form provided by the City.

Section 12: Location and Fencing of Tank Batteries

In the event production is obtained, and the oil storage tank battery is located within the city-limits, the same shall be erected within the confines of an earthen or concrete wall designed in such a manner that the area inside the retention wall would retain the total volume of the tanks located therein and the same shall be completely enclosed by a suitable all metal wire fence of a sufficiently strong and close mesh construction that it will not be penetrable by domestic animals and or small children. Any gate or gates installed for the use of ingress or egress shall be kept locked when not in use. In no event shall such battery be located nearer than a 100 foot radius from any residence, commercial structure or public building, unless application contains a signed notarized release from the property owners within such 100 foot radius. All lines on lease shall be buried to a minimum of (1) foot.

Section 13: Pumps to be Electrically Powered

No pumping unit used for the purpose of lifting oil shall be powered with any power other than electricity.

Section 14: Maintenance and Fencing of Well Jacks

Any well jacks or units operating within the corporate limits of the city shall be kept clean, painted, in good repair and properly lubricated in order that they will operate quietly and they shall be enclosed by an all metal fence of a height of not less than six (6) feet and of a type suitable to prevent trespassing on the part of any unauthorized, particularly children and domestic animals. A lock shall be installed on each gate and shall be locked except during workover.

Section 15: Penalties

It shall be unlawful and an offense for any person to violate or fail to comply with any provisions hereof, irrespective

of whether or not the verbiage of each section hereof contains the specific language that such violation of failure to comply is unlawful and is an offense. Any person who shall violate any of the provisions of this ordinance or any of the provisions of a permit issued pursuant hereto, or who shall fail to comply with the terms hereof, shall be guilty of a misdemeanor and shall on conviction thereof, be fined in the sum of not less than five ($5.00) and not more than Two Hundred Dollars ($200.00) and the violation of each separate provision thereof shall be considered a separate offense. Each days continuance of a failure to comply therewith shall constitute a separate and distinct offense for each of said days.

Section 16: Cumulative of Similar Ordinances and Repeal of Inconsistent Ordinances:

The provisions of this ordinance are cumulative of all other ordinances or parts of ordinances governing or regulating the same subject matter as that covered herein; provided, however that all prior ordinances or parts of ordinances inconsistent with any of the provisions of this ordinance are hereby expressly repealed to the extent of any such inconsistency or conflict.

Section 17: Invalidity of Any Part of this Ordinance

If any section, subsection, sentence, clause or phrase of this ordinance is, for any reason, held to be unconstitutional or invalid, such holding shall not effect the validity of the remaining portions of this ordinance. The Commissioners of the City of Burkburnett, Texas, hereby declare that it would have passed this ordinance and each section, subsection, sentence, clause or phrase thereof irrespective of a fact that any one or more sections, subsections, sentences, clauses or phrases be declared unconstitutional or invalid.

Section 18: Enforcement

This chapter may be enforced by injunction, cancellation of the permit of the operator to continue drilling, or in any other legal manner in a court of competent jurisdiction.

Section 19: Emergency

The fact that there is increased drilling activity for oil and/or gas within the city limits of the City of Burkburnett, Texas, and that it is probable that same will continue, and the fact that the present regulations governing the drilling and maintenance of oil and gas wells in the corporate limits of the City of Burkburnett are inadequate, creates an urgency and emergency for the immediate preservation of the public peace, health, safety and general welfare, and requires that this ordinance shall take effect from and after its passage and publication.

ATTESTED AND APPROVED this the 21st day of April, 1980.

ATTEST:

/s/ Lahoma Wood
City Secretary

/s/ Doss Hamilton
Mayor

(SEAL)